

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION

ATTACHMENT A TO RESOLUTION R5-2011-XXXX

MUTUAL RELEASE AND COVENANT NOT TO SUE  
FOR  
THE WIDE AWAKE MERCURY MINE  
AND  
THE CENTRAL, CHERRY HILL, EMPIRE, MANZANITA AND WEST END MINE  
PROPERTIES  
COLUSA COUNTY, CALIFORNIA

**I. INTRODUCTION**

**THIS MUTUAL RELEASE AND COVENANT NOT TO SUE** (the “Mutual Release”) is provided pursuant to Central Valley Regional Water Quality Control Board (“Central Valley Water Board” or “Board”) Resolution R5-2011-XXXX (hereafter “Resolution”) authorizing its Executive Officer to negotiate and sign the Mutual Release concerning the Wide Awake Mercury Mine property and the Central, Cherry Hill, Empire, Manzanita and West End Mine properties (the “Central Mine Group”)(collectively “the Properties”), which are more particularly described in Attachment B to the Resolution.

Pursuant to Water Code section 13267, the Central Valley Water Board has issued Technical and Monitoring Report Orders R5-2010-0048 and R5-2010-0049, which direct Homestake Mining Company of California (“Homestake”) and other parties to undertake investigative actions at the Properties. Homestake has denied having liability for investigation and cleanup activities at the Properties, and has filed a timely petition for review of these Orders with the State Water Board. The Central Valley Water Board understands that Homestake has agreed to undertake, at the direction and under the oversight of the Central Valley Water Board, remedial actions at the Properties. Although it is the position of the Central Valley Water Board that it is precluded from apportioning liability for investigation and cleanup activities in Board-issued Orders, the Board hereby recognizes that the scope of the actions that Homestake has agreed to undertake is estimated to be greater than its proportional share, if proportionality was determined on the basis of the time that Homestake was involved with the Properties and the scope of Homestake’s activities at the Properties. Homestake desires a commitment, to the maximum extent permitted by law, that it, as well as all of its directors, officers, employees, partners, affiliates, and agents, (individually “Homestake” or “Released Party” and collectively the “Released Parties”) will not be subject to any further liability for, or the subject of any actions, claims, orders, demands, enforcement actions or other civil or administrative proceedings, including without limitation, any investigation, monitoring or remediation requirements, related to or arising from the Known Conditions as of the date this Mutual Release is fully executed (“Effective Date”).

## **II. DEFINITIONS**

For purposes of this Mutual Release, "Known Conditions" means all conditions of pollution or nuisance at, under, or originating from the Properties or any portion thereof, that was known to the Central Valley Water Board prior to the Effective Date. The term "known to the Central Valley Water Board" means all information regarding the pollution or nuisance at, under, or originating from the Property, or any portion thereof, that was disclosed to the Central Valley Water Board, or that is reasonably discernible from the reports listed in Orders R5-2010-0048 and R5-2010-0049, the Resolution, or the investigations, work plans, reports, or any other information submitted to the Central Valley Water Board by any party prior to the Effective Date.

## **III. FINDINGS OF FACT**

This Mutual Release is based on the findings made by the Central Valley Water Board in Resolution \_\_\_\_\_, and on the following findings by Board staff:

1. The Properties are within the jurisdiction of the Central Valley Water Board due to the Known Conditions and are subject to the provisions of Central Valley Water Board Orders R5-2010-0048 and R5-2010-0049 (the "Orders"). The Central Valley Water Board enters into this Mutual Release pursuant to California Water Code sections 13000 et seq. The Central Valley Water Board has authority to release and covenant not to sue or assert claims for environmental investigation or remediation or other related claims against potentially responsible dischargers at environmentally-impacted properties, where, as here, the agreement is sufficiently in the public interest.
2. It is not disputed that mining-related discharges at the Properties are primarily the result of historical mining operations on the Properties, which ended almost entirely by the early 1940's, except for mining in Central Mine Group in the early 1970's undertaken by Bailey Minerals Corp. The Board contends that limited waste material was also generated by exploratory actions, including geothermal exploration activities unrelated to Homestake, which occurred in the 1970s and 1980s. There is no active mining at any of the Properties, and the mining activity that created the majority of the mining waste that has been eroding into waters of the State occurred almost exclusively prior to the early 1970's.
3. With respect to the involvement of Homestake at the Properties, it is not disputed that:
  - a. Homestake is not a current owner or operator at either of the Properties, and has not been involved at either of the Properties for at least ten years;
  - b. Homestake never operated a mine at either of the Properties;

- c. Homestake had a lease allowing it to carry out limited exploration and development activities at the Wide Awake Mine from 1978-1992, and held a fee interest in portions of the Central Mine Group properties from 1978-1999, and a lease allowing limited exploration and development activities at other portions of the Central Group Mines from 1978-1993; and
  - d. Homestake's exploration activities at both of the Properties were reviewed prior to implementation with respect to their potential for environmental impacts on water quality and approved by Colusa County and the Central Valley Water Board.
- 4. The Board asserts that Homestake, as an owner in fee or lessee of the properties, is liable under the California Water Code as a "passive discharger" for releases of mercury from the Properties, based on its failure to prevent discharges from mining wastes to waters of the State that may have occurred during the period of its involvement with the Properties.
- 5. Homestake denies that any activities it engaged in at the Properties resulted in the discharge of mercury from mining wastes to waters of the State, and denies that it would have liability as a "passive discharger" under California Water Code sections 13267, 13350, and 13304. Homestake also denies that, as a holder of exploration leases that did not provide exclusive control of the leased properties, it would be liable, even under the "passive discharger" liability claims asserted by the Board, for any releases of mercury to waters of the State from the Wide Awake Mine and those parcels at the Central Mine Group not held by Homestake in fee.
- 6. Homestake further asserts that any harm resulting from discharges to waters of the State for which it may be liable is reasonably divisible by term of ownership, and nature of activities on the Properties, and that its divisible share, if any, would be at worst a small percentage of the cost of investigation required by the Orders, and of any subsequent remediation required.
- 7. Given the nature of Homestake's involvement with the Properties, the Board agrees that the value of the Homestake's commitment under this agreement represents significantly more than Homestake's proportionate share of liability for any contamination at the Properties, should the Board be able to establish Homestake's liability for site investigation and cleanup under the California Water Code and if the Board had the ability to apportion liability between the parties formerly and currently involved at the Properties.
- 8. The proposed settlement represents a good faith resolution of the liability of Homestake to the Central Valley Water Board under the applicable provisions of State, federal and common law, including Water Code sections 13267, 13304, and 13350, for any condition of pollution or nuisance arising at or originating from the Properties.

9. By entering into this Mutual Release, Homestake certifies that, to the best of its knowledge and belief, it has fully and accurately disclosed to the Central Valley Water Board any and all information known to Homestake and all information in the possession or control of its officers, directors, employees, contractors and agents which relates in any way to any existing condition of pollution or nuisance, or any past or potential future release of hazardous substances, arising at or originating from the Properties.
10. This Mutual Release is consistent with the goals and purposes of the Porter-Cologne Water Quality Control Act (Water Code § 13000 et seq.).

#### **IV. MUTUAL RELEASE AND COVENANT**

1. In accordance with Resolution \_\_\_\_\_ and as recommended by the Board's Prosecution Team and Executive Officer, the Central Valley Water Board expressly finds that the Released Parties shall not be liable or otherwise responsible for such Known Conditions and hereby covenants and agrees not to initiate, bring, or support any claim, order, demand, enforcement action or other civil or administrative proceeding against the Released Parties arising out of or related to such Known Conditions under any local, state or federal statute or the common law, including but not limited to, in their entirety, the United States Code, including the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), the various California Codes, or other applicable laws, regulations, ordinances, or civil, judicial or administrative authorities, having application to the handling, release, presence, migration, cleanup, containment or maintenance of the Known Conditions at, on, under or originating from the Properties, or any portion thereof.
2. In partial consideration for this Mutual Release, the Released Parties promise to carry out on behalf of the Board the remediation as described in the Work Plan to address mining-related materials in the areas of the Properties upland of Sulphur Creek, and to reimburse the Regional Board for its oversight of the implementation of the Work Plan. In addition, the Released Parties agree to pay into an escrow established by the Board, the sum of \$50,000 to be used at the direction and in the discretion of the Board for investigative work not included in the Work Plan and to be carried out by the Board or third parties, to identify the potential for impacts to the waters of the State from mercury-bearing mining-related materials in Sulphur Creek. In further consideration for this Mutual Release, the Released Parties hereby release and covenant not to sue the Central Valley Water Board, its authorized officers, employees or representatives, with respect to any and all liability or claims associated with or arising out of the Known Conditions.
3. Section 113(f)(2) of the Comprehensive Environmental Response, Compensation, Liability and Recovery Act of 1980 (42 U.S.C. § 9613(f)(2).) provides that: "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for

contribution regarding matters addressed in the settlement.” Accordingly, the Central Valley Water Board affirms that this Mutual Release and Covenant Not to Sue resolves the Released Parties’ liability to the Central Valley Water Board with regard to any claims related to the matters included in the Order and Resolution \_\_\_\_\_, including all claims regarding the handling, storage, presence, migration, cleanup, or disposal of the Known Conditions at, under, or originating from the Property, and that the Released Parties are entitled to protection against claims for contribution by any other parties to the extent authorized by state, federal or common law for all matters covered under the proposed settlement, including California Civil Code section 877 and 42 U.S.C. § 9613(f)(2).

4. Homestake’s obligation under this agreement is to perform on behalf of the Board, and at the direction of and under the supervision of the Board, the work described in the attached Work Plan as arranged by the Board, through its own workforce or through contractors it has retained, subject to a dollar cap of \$2,172,014 (including costs incurred to date by Homestake for permitting and engineering work in connection with implementation of the Work Plan). Should Homestake be unable to carry out any of the work described in the Work Plan for reasons beyond its control, such as to the failure or refusal of the current owners of the properties to allow the work to go forward, Homestake may pay to the Board, or to a trust with the Board as the named beneficiary, the estimated cost of the work that cannot be completed, including the estimated oversight costs of the Board, except that in no event shall Homestake be required to pay a total amount in costs for work described in the Work Plan that exceeds the dollar cap in this agreement.
5. The Board will not seek to hold Homestake liable or otherwise responsible for any additional work outside of the Work Plan relating to contamination at or from the Properties. Homestake’s obligations under the scope of work in the Work Plan will not include post-completion operation and maintenance with respect to any portion of the Properties, including any portion of the Properties that may be used for the disposal or relocation of materials, or maintenance of any constructed feature such as caps or retaining or diversion structures.
6. This Release shall be without prejudice to the ability of the Central Valley Water Board to take action against any party other than the Released Parties, relating to the investigation, cleanup, or cost of investigation or cleanup of the Known Conditions.
7. Notwithstanding any other provisions of this Mutual Release, the Central Valley Water Board reserves the right to assert any claims, enforcement actions or other civil or administrative proceedings against the respective Released Parties relating to the acts or omissions of the Released Parties arising after the Effective Date and which are based on the failure of the respective Released Parties, to the extent they have control over the Property, to (i) comply with the requirements and conditions of the Mutual Release, (ii) comply with any deed restrictions and/or institutional constraints currently imposed or that may be subsequently imposed

pursuant to Central Valley Water Board order, and (iii) cooperate in providing reasonable access to the Property for remediation and monitoring purposes and construction, maintenance, and repair of any necessary remediation and/or monitoring system required by the Central Valley Water Board pursuant to Central Valley Water Board orders. If the Central Valley Water Board determines that a Released Party has failed to comply with any of these three enumerated requirements, and the Central Valley Water Board elects to proceed against that Released Party, then this Mutual Release shall be suspended as to that Released Party, and the Central Valley Water Board and the Released Party shall then have any rights or defenses they would have had if this Mutual Release and Covenant Not to Sue had not existed.

8. This Mutual Release may be executed in one or more counterparts, each such counterpart being deemed an original but all counterparts constituting a single instrument.
9. Each of the undersigned parties hereby certifies, and warrants that he or she is authorized to bind his or her agency or entity to the continuing obligations described herein, and that the foregoing is a full, true and correct copy of Attachment A to Resolution \_\_\_\_\_, Mutual Release and Covenant Not To Sue adopted by the California Regional Water Quality Control Board, Central Valley Region, on \_\_\_\_\_

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION

By: \_\_\_\_\_

Date: \_\_\_\_\_

HOMESTAKE MINING COMPANY OF CALIFORNIA

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_